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In the Supreme Court of the United States

OCTOBER TERM 1964

No. 151

ALVIN CHANCE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (R. 565–578) is reported at 322 F. 2d 201. The opinion of the court of appeals denying the petition for rehearing (R. 659–664) is reported at 331 F. 2d 473.

JURISDICTION

The judgment of the court of appeals was entered on August 27, 1963. A petition for rehearing was denied on May 5, 1964. The petition for a writ of certiorari was filed on June 4, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the procedure used in the selection of the grand jury which indicted petitioner required dismissal of the indictment.

STATEMENT

Petitioner was convicted in the United States District Court for the Southern District of Florida (Miami Division) on three counts of an indictment charging possession, transportation, removal and concealment of non-taxpaid whiskey (R. 13). On March 23, 1962, he was sentenced to one year and one day on each count, the sentences to run concurrently (R. 16–17). He promptly entered upon the service of his sentence, and was released on December 28, 1962 (R. 659). Nevertheless, an appeal was brought on his behalf, urging as the sole error the denial of his motion to dismiss the indictment on the asserted ground that the grand jury was not selected, drawn or summoned in accordance with law.[1] No challenge was made to the petit jury.

The record regarding procedures used in selecting the grand jury may be summarized as follows:

1. The Miami Division of the United States District Court for the Southern District of Florida maintains three separate jury wheels or jury boxes: one for Miami (covering, primarily, Dade and Broward Counties), one for Fort Pierce, and one for West Palm

[1] Other attorneys whose clients had been indicted by the same grand jury appeared and filed or joined in briefs as *amici curiae*. Since petitioner's conviction of a felony may have collateral consequences, we do not believe that the fact that he has served his term of imprisonment renders this case moot. See *Pollard* v. *United States*, 352 U.S. 354, 358; *United States* v. *Morgan*, 346 U.S. 502, 512–513; *Fiswick* v. *United States*, 329 U.S. 211, 220–221.

Beach (R. 251). The Miami box was completely refilled with 5,000 names (R. 242) in June and July 1959 (R. 236, 260). In August 1960, the district court ordered a grand jury drawn from this box (R. 275). The jury was empanelled on September 6, 1960, and petitioner was indicted on August 2, 1961 (R. 9).

In both Dade and Broward Counties, the major source used was male names taken from voter registration lists. In Broward, names were taken at random from each of the county's precincts (R. 282–283); in Dade, names were taken from 43 assorted precincts of the 210 in the county (R. 236, 346, 519, 524). The selected precincts were geographically distributed throughout the county (R. 519),[2] and precincts other than those used in 1957 were chosen to avoid drawing the same names twice in a short period of time (R. 278–279). In addition, volunteers were accepted (R. 265). Some 40 to 60 names were obtained in that fashion (R. 266).[3]

2. Approximately 10 percent of the names placed in the jury box were Negroes (R. 238).[4] Only six

[2] In December 1959, it was discovered that Miami Beach and Coral Gables had inadvertently been neglected when names were taken from the precinct lists in June and July (R. 242–243, 265). On the oral order of the district court (R. 245), 1,000 additional names were selected from precincts in those two sections of the county and added to the jury box (R. 242–243, 265). Names of male and female volunteers were also added to the box at that time (R. 266).

[3] It is not clear whether these 40 to 60 names were male or female or a mixture of both (compare R. 266 with R. 292).

[4] Slightly over 12 percent of the adult population of both Dade and Broward Counties are Negro, the figures being 75,573 out of 613,021 for Dade and 27,009 out of 216,526 for Broward. U.S. Census of Population, 1960, General Population Characteristics Report, Series PC(1)-11B, Table 27, Florida. Census

percent of the registered voters in Dade County were Negro (R. 518), and it appears that the precincts selected were predominantly white precincts (R. 348–358, 519, 524–525). However, a special solicitation of Negro ministers and organizations was made to obtain names of Negroes. (R. 240).

3. Women's names were obtained from a list of volunteers for jury service (R. 239). Before November 1959, only those who had registered for state jury service at the Dade and Broward County courthouses appeared on the list (*ibid.;* R. 261); women who volunteered for federal jury service were told that they were eligible only if they registered at the county courthouses (R. 239). In November, however, the clerk's office was informed by the Administrative Office of the United States Courts that women were to be eligible for federal jury service whether or not they had registered with the State (*ibid.;* R. 261). Thereafter, women volunteers were accepted at the United States District Court and added to the list of male volunteers, and both sets of names were added to the box when it was replenished in December 1959 (R. 266, 291–292).

Under this arrangement, there were 394 women volunteers registered in Broward County, of whom 215 were actually available for jury service (R. 220), and 1,952 women registered in Dade County (R. 228). Four women were on the panel from which the drawing was made (R. 522–523), and three actually served on the grand jury which indicted petitioner (R. 516).

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figures are in terms of white and non-white, but non-whites other than Negro are only about one percent of the total non-white population figures for the two counties. *Ibid.*, and Table 28.

4. Prospective volunteers for jury duty were asked three questions at the clerk's office: (1) whether they were citizens, (2) whether they had been residents of Florida for one year, and (3) whether they had been residents of the county for six months (R. 289). A full inquiry of the qualifications of prospective jurors was left to the voir dire (R. 294). In filling the box, the names were first placed in a wastebasket (R. 268). The jury commissioner and the chief deputy clerk then alternately took handfuls of names and transferred them to the box (R. 267).

5. The court of appeals, one judge dissenting, upheld the district court's denial of petitioner's motion to dismiss the indictment. It found that there was no showing of any exclusion of any group or class of potential jurors. It noted that the real gist of petitioner's complaint was that the jury list was not a "literal cross-section" of the community (322 F. 2d at 204; R. 571), and held that such proportional representation is not required. The dissenting judge was of the view that limiting the jury list to males who have registered to vote and females who volunteer for jury service did not meet the requirements of 28 U.S.C. 1861.

6. The panel of the court of appeals included Senior District Judge Whitehurst, who formerly was chief judge of the Southern District of Florida. No objection was made at the time of oral argument to Judge Whitehurst's participation. After the decision of the court of appeals, petitioner moved for a rehearing *en banc*, asserting for the first time that

Judge Whitehurst was disqualified (R. 587, 595–596). He contended that during Judge Whitehurst's tenure as chief judge the grand jury was impanelled and indictments were returned by the challenged grand jury, including the indictment in the case from which the present record is derived.[5] In addition, petitioner contended that Judge Whitehurst presided at the trial of two defendants indicted by the challenged grand jury (R. 595), although no jury challenge was raised in either of these two cases. The petition for rehearing was denied.

ARGUMENT

The district court and the court of appeals properly rejected petitioner's challenges to the selection of the grand jury which indicted him. Since the method used was designed to produce a grand jury which would represent a cross-section of the community and since there was no purposeful exclusion of any cohesive class or group, the selection process was lawful and valid. The fact that some other method might achieve better results does not invalidate the procedure used by the jury commissioner in the present case.

1. It is only cognizable and cohesive classes and groups whose exclusion invalidates a jury-selection system. *Hernandez* v. *Texas*, 347 U.S. 475, 478. Persons who fail to register to vote do not meet any of the standards of cohesiveness necessary to qualify as

[5] By agreement of the parties the record in that case, *United States* v. *Meyer, et al.*, No. 12,007–M–Cr., was adopted for purposes of petitioner's motion to dismiss the indictment (R. 12, 19–20, 208).

a cognizable class, and hence a jury list comprising only voters is not unlawful. *Gorin* v. *United States*, 313 F. 2d 641, 644 (C.A. 1), certiorari denied, 374 U.S. 829; *United States* v. *Agueci*, 310 F. 2d 817, 833–834 (C.A. 2), certiorari denied, 372 U.S. 959; *Young* v. *United States*, 212 F. 2d 236, 238 (C.A.D.C.), certiorari denied, 347 U.S. 1015. Moreover, voting lists were not the exclusive source of male jurors. Volunteers were accepted, and the names of Negro males were obtained through suggestions from Negro ministers and organizations. It was, therefore, entirely proper for the jury commissioner to use voting lists as a primary source for male jurors.

2. Although women do comprise a cohesive class which may not be purposefully excluded (*Ballard* v. *United States*, 329 U.S. 187), the Florida system adopted here was not calculated to exclude women; nor, in fact, did it have any such effect. The system whereby women are accepted for jury duty only if they volunteer has recently been sustained by this Court against constitutional challenge. *Hoyt* v. *Florida*, 368 U.S. 57. And the policy underlying the State practice, which was accepted as reasonable by the Court in *Hoyt*, 368 U.S. at 60–64, also supports the procedure followed in the present case. Moreover, three women actually served on the grand jury which indicted petitioner, and it appears likely that between 26 and 43 percent of the names in the jury box were names of women.[6] Consequently, it cannot be said

[6] The testimony is unclear as to how many names were obtained from the voter lists in June and July, whether all or only some of those so obtained were put in the jury box, and

that the system operated so as to exclude women, or that it was calculated to have any such result.

3. Nor can it be said that the system had the purpose or effect of excluding Negroes. The record demonstrates that approximately 10 percent of the names placed in the jury box were names of Negroes and that Negroes constitute not more than 12 percent of the adult population of the two counties. Moreover, the jury commissioner took affirmative steps to supplement the number of Negro jurors who were selected from voting lists (p. 4, *supra*).

4. Petitioner's basic claim must, therefore, be that jury commissioners are compelled by 28 U.S.C. 1861 to adopt a system which will inevitably produce an actual cross-section of the community. This proposition has been uniformly rejected. *United States* v. *Dennis,* 183 F. 2d 201, 220–224 (C.A. 2), affirmed, 341 U.S. 494; *United States* v. *Flynn,* 216 F. 2d 354, 388 (C.A. 2), certiorari denied, 348 U.S. 909; *Dow* v. *Carnegie-Illinois Steel Corporation,* 224 F. 2d

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whether all or only some of the women's names obtained from the county courthouses were put in the jury box (R. 262). If the 5,000 names in the box included the 215 available women registered in Broward County and the 1,952 women registered in Dade County, then women comprised 43% of those whose names were in the box (and 36% after December 1959, when the box was supplemented with 1,000 additional names, see note 2, *supra*). If 5,000 names from the voter registration lists were put in and the names of the women registered for state jury duty were then added, then women comprised 30% of those whose names were in the box (and 26% after December).

414, 428 (C.A. 3), certiorari denied, 350 U.S. 971; *Gorin* v. *United States*, 313 F. 2d 641 (C.A. 1), certiorari denied, 374 U.S. 829; *United States* v. *Henderson*, 298 F. 2d 522, 525 (C.A. 7), certiorari denied, 369 U.S. 878.[7] What the statute protects against is the purposeful exclusion of any group of persons who would qualify under its terms. It neither expressly nor impliedly directs that the jury commissioners use any particular method in selecting jurors so long as the method they use is not *calculated* to evade the general objective of achieving a cross-section of the community. Nor can any such direction be read into the statute by reason of its amendment in 1957. The legislative history discloses that the sole purpose of the amendment was to remove an available limitation on the classes entitled to perform jury service; it was not intended to impose any affirmative duties on the federal jury officials. Compare 103 Cong. Rec, 13154, 13157, 13249, 13277, 13325–13326 with 13250, 13290–13291, 13317.

5. Petitioner's objections to the conduct of the jury officials in executing their statutory duties are also without merit. The jury box from which the names were drawn contained some six thousand names, approximately twenty times the minimum statutory requirement of "three hundred qualified persons." 28 U.S.C. 1864. Consequently, even if the jury com-

[7] The decision in *United States* v. *Hoffa*, 196 F. Supp. 25 (S.D. Fla.), relied upon in the dissenting opinion, was by a district court within the circuit below. Any general rule that it can be deemed to have established beyond its own peculiar facts has been impliedly overruled by the court of appeals.

missioner failed to determine in advance whether each of the persons whose name was in the box was fully qualified to serve, the box may be presumed to have included 300 qualified jurors. More than 2,000 names were those of women who qualified for State jury duty, which prescribes standards at least as strict as does federal jury duty. Compare 28 U.S.C. 1861 with Florida Statutes, § 40.01. Except for physical capacity and residence in the district, the Florida qualifications for voting are the same as federal jury standards. See Florida Statutes, § 97.041. Hence it is most unlikely that the number of qualified jurors in the box fell below the statutory minimum. Cf. *Beatrice Foods Co.* v. *United States*, 312 F. 2d 29, 35–37 (C.A. 8), certiorari denied, 373 U.S. 904. The burden of proving that it did was on petitioner, *United States* v. *Meyer*, 113 F. 2d 387, 395 (C.A. 7) certiorari denied, 311 U.S. 706, and the district court correctly concluded that this burden had not been satisfied.[8]

Nor was the selection invalid because the jury officials drew names for the box by handfuls rather than individually. The statute was intended to assure only that both the commissioner and the clerk participate equally in the selection of a jury, *Hauptman* v. *United States*, 43 F. 2d 86, 89 (C.A. 9), and

[8] In *United States* v. *Silverman*, 129 F. Supp. 496 (D. Conn.), on which petitioner relies (Pet. 14–15), there was a *total* lack of information concerning the persons whose names were put in the box (all names were suggested by sponsors, who were shown to have been given no standard upon which to base their recommendations), and the jury list consisted of only 414 names. Hence a mere 28% disqualification rate (as against 95% here) would have been sufficient for the number of qualified persons to fall below 300.

not that any particular formalistic act be performed by either or both. Cf. *Gaughan* v. *United States*, 19 F. 2d 897, 898 (C.A. 8).

6. Judge Whitehurst's failure to recuse himself raises no substantial issue since recusal was not required by either 28 U.S.C. 47 or 28 U.S.C. 455. The judge was not disqualified by the terms of the former statute since the appeal was clearly not "from the decision of a case or issue tried by him." Nor had he even any occasion to pass on the issue in other cases tried by him in the district court. And since the system was not devised by him or executed under his authority, he had no actual interest in sustaining it. In fact, the orders given to the jury commissioner by the district court with respect to this grand jury were given by District Judge Emmett C. Choate (R. 275). As the court of appeals correctly held, the mere fact that Judge Whitehurst had known of the system in his judicial capacity before the case arose would not be sufficient to warrant his disqualification.

7. Finally, this case presents no issue of major significance since the method used in selecting jurors in the Southern District of Florida has been changed since the case arose. Today jurors are selected from city directories, without reference to their race or sex. Questionnaires are then mailed to each of those selected, and the returns are examined to determine whether those chosen are qualified under 28 U.S.C. 1861. Each qualified prospective juror is then listed on a separate slip of paper, and these are used in

accordance with the procedure described by 28 U.S.C. 1864.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.
HERBERT J. MILLER, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
MARSHALL TAMOR GOLDING,
Attorneys.

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